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No. 80-1205
IN THE

Supreme Court of the United States

October Term, 1980

FORD MOTOR CREDIT COMPANY,

Petitioner,

vs.

JANET CENANCE, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Petitioner, Ford Motor Credit Company* ("Ford Credit"), files this Reply Brief pursuant to Rule 22.5 of the Supreme Court Rules. This Reply Brief is filed in response to the Brief for Respondents in Opposition.

I.

The Decision of the Fifth Circuit Is in Conflict With the Decisions of the Sixth, Seventh and Ninth Circuits on the Creditor Identification Issue.

Respondents argue that the decision of the Fifth Circuit on the creditor identification issue is not in conflict with the decisions of the Sixth, Seventh and Ninth Circuits. Respondents claim that the Fifth Circuit's decision dealt with the adequacy of the identification of Ford Credit on the disclo-

*A list of affiliates of Ford Credit as required by Rule 28.1 of the Supreme Court Rules is set forth in full as Appendix F to the Petition for a Writ of Certiorari and is incorporated herein by this reference.

sure form and that this issue was not decided by the Sixth, Seventh and Ninth Circuits. This argument is clearly specious.

In all four Circuits the identical Truth in Lending claim was made against Ford Credit and the identical disclosure form was reviewed by the Courts. Respondents claim that the Sixth, Seventh and Ninth Circuits decided only the question of whether the word "creditor" must be used in identifying Ford Credit. This claim is totally unfounded. All three Circuits considered the broader question of whether Ford Credit had been adequately identified in the disclosure statement. In fact, this identity of issues, parties and disclosure forms was pointed out by the Fifth Circuit in these cases:

> "This particular issue is of first impression in this circuit. The Sixth, Seventh and Ninth Circuits have, however, uniformly held that conspicuous identification of a party in Ford's position as assignee adequately describes the relationship of the parties." 621 F.2d at n.2.

It is difficult to imagine a case presenting a more clear conflict in the Circuits. The same form of disclosure of Ford Credit's status as an assignee of the contract has been approved for use in the Sixth, Seventh and Ninth Circuits but has been disapproved for use in the Fifth Circuit. This Court should grant the Petition for a Writ of Certiorari to resolve this conflict.

II.

The Decisions of the Third, Fifth, Tenth and District of Columbia Circuits Are in Conflict With Respect to the Disclosure Obligations of Multiple Creditors Under Regulation Z.

Respondents' argument that the Circuits are not in conflict on the multiple creditor issue is completely refuted by the

following quotation from the decision of the District of Columbia Circuit in *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. 1977):

> "There has been a split among the Circuits as to the proper construction of this regulation. The Third Circuit, in *Manning v. Princeton Consumer Discount Co.*, 533 F.2d 102 (3d. Cir.), *cert. denied*, 429 U.S. 865, 97 S.Ct. 173, 50 L.Ed.2nd 144 (1976), found that a transaction in which an automobile dealer arranged a loan for a customer with a finance company was in reality a 'credit sale,' and that both the dealer and the finance company were 'creditors' within the meaning of the Act and the Regulation. It held, however, that the duty of each to make the required disclosures, and the liability for failure to do so, was controlled by Section 226.6(d). It noted that the first sentence of that section would require 'each creditor' to make 'those disclosures . . . which were within his knowledge and the purview of his relationship with the customer,' but concluded that the more specific language of the third sentence controls whenever a 'seller . . . arranges credit.' By its terms, the *Manning* court held, the third sentence limits both the duty and the liability to the seller alone.
>
> Three other Courts have reached the opposite conclusion." 574 F.2d at 601.

Respondents attempt to distinguish the decision of the Third Circuit in *Manning v. Princeton Consumer Discount Co., Inc.*, 533 F.2d 102 (3d Cir. 1976) but conclude by observing that the decision in *Manning* has been repudiated by other Circuits. [Resp. Br. In Opposition at 10-11.] Respondents attempt to distinguish *Manning* by arguing that *Manning* did not involve a joint disclosure statement of the type submitted to Respondents. Even assuming that the disclosure statements provided to Respondents can be char-

acterized as joint disclosure statements, the legal principle established in *Manning* would apply to these cases. In *Manning*, the Third Circuit held that, where the seller and the finance company are both creditors, section 226.6(d) of Regulation Z places all credit sale disclosure obligations upon the seller where the seller acts as an arranger of credit. In these cases, the plaintiffs have likewise claimed that the sellers acted as arrangers of credit and Ford Credit acted as the credit extender. The Fifth Circuit sustained these claims but, like the Tenth and District of Columbia Circuits, declined to follow the Third Circuit's holding in *Manning* placing all credit sale disclosure obligations upon the sellers as arrangers of credit.

Respondents' argument that the Third Circuit's decision has been repudiated in other Circuits is a concession that there is a conflict in the Circuits on this issue. And, the above quotation from the *Price* case clearly indicates that even the Circuits recognize the conflict in their decisions on the multiple creditor issue. This Court should grant the Petition for a Writ of Certiorari to resolve this conflict.

III.

The Truth in Lending Simplification and Reform Act Does Not Resolve the Conflict in the Circuits.

Respondents argue that the Truth in Lending Simplification and Reform Act has now resolved the conflict in the Circuits described in the Petition. This is simply not true.

The Truth in Lending Simplification and Reform Act will not resolve the conflict in the Circuits as it affects the countless millions of disclosure statements that have been used by Petitioner and creditors in the massive installment sales financing industry. Although the Truth in Lending Act has a one year statute of limitations for affirmative claims brought by consumers, many courts have not applied this

statute of limitations to Truth in Lending claims asserted by way of counterclaim, recoupment or offset. *See* Willenzik and Leymaster, *Recent Trends in Truth-In-Lending Litigation*, 35 Bus. Law. 1197, 1218-19 (1980). Thus, the conflict and confusion in the Circuits will continue for many years into the future if the Petition is not granted. In fact, the conflict and confusion could worsen once the Simplification Act becomes effective since the disclosure rules applicable to installment sales financing will vary both by the Circuit deciding the issue and by the date when the contract was signed.

The confusion and uncertainty caused by the conflict in the Circuits described in the Petition will continue to spawn litigation and will expose creditors to massive liability under the Act and the Regulation. The enormous importance of this case to the consumer finance industry is demonstrated by the fact that Amicus Curiae Briefs in support of the Petition have been filed by the American Bankers Association, the California Bankers Association, the Consumer Bankers Association and the National Consumer Finance Association. This Court should grant the Petition to settle these important questions of federal law.

IV.

Conclusion.

The Respondents have failed to negate the clear conflict in the Circuits on the questions presented for decision. These questions concern important issues of federal law of vital concern to consumers and to the entire consumer finance industry. There is a clearly demonstrated need for uniformity of decision on these questions.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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